IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

TURNER CONSTRUCTION COMPANY,	)	
	)	
Plaintiff,	)	Civil Action No. 1:16-cv-58 (IMK)
	)	
v.	)	
	)	
WYATT INCORPORATED,	)	
	)	
Defendant.	)	

TURNER CONSTRUCTION COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff/counter-defendant, Turner Construction Company ("Turner"), respectfully submits this memorandum in support of its motion for partial summary judgment against defendant/counterclaimant Wyatt Incorporated ("Wyatt").

I. SUMMARY

This action involves a contract dispute arising from a construction project in Clarksburg, West Virginia for the United States known as the Biometrics Technology Center. Turner moves for partial summary judgment against Wyatt on its counterclaim. As will be discussed below, Wyatt knowingly executed sworn releases and waivers pursuant to which it expressly released all claims for damages arising from labor and materials that it provided to the Project for the period up through and including October 31, 2014. Accordingly, summary judgment should be entered with respect to all of Wyatt's claims for damages to the extent they arose on or before October 31, 2014.

III. STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

A. Prime Contract

1. On or about September 14, 2010, Turner Construction Company ("Turner") entered into a contract (the "Prime Contract") with the United States of America, acting by and through the Federal Bureau of Investigation, United States Department of Justice (the "Owner"), to furnish materials and perform labor for the construction of the Biometric Technology Center, New Office Building and Central Utilities Plant Expansion located on the premises at the FBI CJIS Division Complex in Clarksburg, West Virginia (the "Project"). (Wyatt Counterclaim (Dkt. 34), ¶ 3. *See also* Declaration of Fred O. Dickson ("Dickson Decl."), **Exhibit 1**, at ¶ 4)).

2. Turner served as the general contractor for the Project pursuant to its Prime Contract with the Government. (Dickson Decl., Exhibit 1, ¶ 4).

B. Wyatt and the Wyatt Subcontract

3. Wyatt is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. (Wyatt Counterclaim, ¶ 1). According to its website, Wyatt is "a nationally recognized . . . construction contractor [that] . . . serve[s] regional and national clients with a broad range of capabilities including interior construction, architectural millwork, exterior panel systems, fireproofing, and access floor services . . . for new construction, renovation, and retrofit projects in both the private and public sectors." (*See* Wyatt website at http://www.wyattinc.com (last visited 9/22/2016)).

4. On or about April 14, 2011, Turner entered into a written subcontract with Wyatt (the "Wyatt Subcontract" or the "Subcontract") wherein Wyatt agreed to provide the labor and material necessary to complete the drywall and ceiling, access flooring, fabric wrapped panels, fireproofing, and rough carpentry work for the Project. (Wyatt Counterclaim, ¶ 4). A copy of

the Wyatt Subcontract, including its attachments AP-1, Scope of Work, AP-2, Contract Documents (cover page only), AP-3, Lump Sum Prices, AP-4, Special Provisions, and AP-5, Supplementary Provisions, are collectively included as **Exhibit 2**.[1] *See also* Dickson Decl., Exhibit 1, ¶ 6).

5. Article IV of the Wyatt Subcontract, titled "**Price**," states that the sum to be paid Wyatt for the satisfactory performance and completion of its work is $6,222,600. (Subcontract, Exhibit 2, at Article IV, p. 2. *See also* Subcontract, Attachment AP-3, Lump Sum Prices, Page 1 of 1 (identifying lump sum price of $6,222,600)).

6. The Wyatt Subcontract, at Page 1 of 9 of its SUPPLEMENTARY PROVISIONS, supplements the general provisions of Article IV, Price, in the Subcontract, and states in relevant part that:

> The following provisions constitute a part of this Subcontract:
>
> 1. ACCOUNTING/BILLINGS – In addition to Article IV-Price – the following provision shall be included in the Agreement. . . .
>
> * * *
>
> b. The following items **must** be submitted with each month's requisition:
>
> * * *
>
> b. A **release of lien waiver** from the Subcontractor **for the amount due** them for work performed and shipments made **through the cut-off date on the previous month's requisition** when required at the discretion of the Contractor.

(*See* Subcontract, Exhibit 2, at AP-5, Page 1 of 9 (bold and underline added)).

7. Article V of the Subcontract, titled "**Monthly Estimate**," provides in relevant part that: "The Subcontractor agrees that, if and when requested to do so by Contractor, it shall furnish such information, evidence and substantiation as Contractor may require with respect to

[1] Because they are voluminous, Turner is not including all the AP attachments to the Wyatt Subcontract.

the nature and extent of all obligations incurred by Subcontractor for or in connection with the Work, all payments made by the Subcontractor thereon, and the amounts remaining unpaid, to whom and the reasons therefor." (Subcontract, Exhibit 2, Article V, p. 2).

8. To date, Turner has paid Wyatt $6,122,379.37 under the Subcontract. (Dickson Decl., Exhibit 1, ¶ 7).

C. Wyatt's Partial Waivers through May 14, 2014

9. Between February 9, 2012 and May 5, 2014, on twenty-seven (27) separate occasions, Wyatt executed a "PARTIAL WAIVER OF LIEN" ("Partial Waiver"). (*See* Wyatt's Partial Waivers, copies included collectively as **Exhibit 3**. *See also* Dickson Decl., Exhibit 1, ¶ 8). Pursuant to these progress payment Partial Waivers, Wyatt released and waived lien and claim rights but only to the extent of the amount identified as being paid on the Partial Waiver. (*Id.*).

D. Wyatt's Waiver and Release of all claims arising before October 31, 2014

10. Between May 27, 2014 and December 1, 2014, on seven (7) separate occasions, Wyatt executed a sworn "AFFIDAVIT, PARTIAL WAIVER OF LIEN AND RELEASE" ("Waiver and Release"). *See* Wyatt's Waiver and Releases, copies included collectively as **Exhibit 4**, and which also includes a copy of the corresponding Turner payment (i.e., canceled check). *See also* Dickson Decl., Exhibit 1, ¶ 9). Pursuant to these progress payment Waiver and Releases signed by Wyatt without qualification, Wyatt expressly released and waived all lien rights and claims for damages relating to the labor and materials that it provided to the Project for the period up through and including October 31, 2014. (*Id.*).

11. On December 1, 2014, Wyatt executed a sworn Waiver and Release that, in relevant part, provided:

The undersigned [Wyatt], for and in consideration of the progress payment sum of **one hundred fifty seven thousand seven hundred and forty three cents ($157,700.43)** to be paid to it upon return of this executed document made to it by Turner Construction Company (the "General Contractor") . . . for labor employed in and/or materials furnished for the construction of the "FBI BTC New Office Building & CUP Expansion" . . . hereby certifies as follows:

1. The undersigned [Wyatt] has received payment in full for all deliveries of materials to and/or for all work performed in connection with the construction of the project through the date of [Turner] **Application for Payment No. 37 for the period ending 10/31/2014** and hereby represents and warrants that there are no outstanding claims by [Wyatt] through the date of Application for Payment No. ___, **except** for any retention, pending modifications and changes, or disputed claims for extra work as stated herein:

[None identified]

2. In consideration of the above-mentioned payment in full, the undersigned does hereby **waive, release and quit claim** in favor of . . . the general contractor, Turner Construction Company and any other party having an interest in the project and any and all of their successors and assigns, (hereinafter collectively referred to as the "Released Entities"), **all rights that presently exist or hereafter may accrue to the undersigned to assert a lien upon the land** and improvements comprising the project by virtue of any law regarding the rights of a contractor, subcontractor, laborer, supplier, or materialman **to assert a lien or claim against the project** for deliveries of material to and/or work performed in connection with the construction of the project through the date of Application for Payment No. __, **except** for those items listed under No 1 above.

3. The undersigned . . . has the right, power and authority to execute this Affidavit, Partial Waiver of Lien and Release.

4. The undersigned warrants that all laborers and subcontractors employed by it and all suppliers employed by it and all suppliers or materialman from which it has acquired materials in furtherance of the project and any lien or bond claimant relating to the undersigned's contract have been paid in full and none of such laborers, subcontractors, suppliers or materialmen or claimants have any claim, demand or lien against the project.

* * *

6. [Wyatt] does hereby **forever release, waive, and discharge the Released Entities for any and all causes of action, suits, debts, accounts, damages, encumbrances, judgments, claims and demands** whatsoever, in law or equity or otherwise, and whether known or unknown and whether presently ascertainable or not, which [Wyatt] and/or its successors and/or its assignees ever had, now have, or ever will have against the Released Entities, by reason of delivery of material and/or the

> performance of work relating to the project through Application of Payment No. __, except for those items listed under No. 1 above. . . .

(*See* Wyatt's Waiver and Release, subscribed and sworn on December 1, 2014, copy at the second to last page of Exhibit 4 (emphasis added)).

12. Turner paid the above-referenced sum of $157,700.43 to Wyatt on December 30, 2014. *See* Turner canceled check (with Wyatt account number information redacted), included at the last page of Exhibit 4; *see* also Dickson Decl., Exhibit 1, ¶¶ 9-10).

E. Wyatt's modification of the sworn Waiver and Release after December 2014

13. Subsequently, on July 22, 2015, Wyatt executed a modified sworn "Affidavit, Partial Waiver of Lien and Release" ("Modified Waiver and Release") for and in consideration of the joint payment sum of $108,000.00, which Turner paid to Wyatt on June 9, 2015. (*See* Wyatt's Modified Waiver and Release (July 22, 2015), **Exhibit 5**; Dickson Decl., Exhibit 1, ¶ 12.) A copy of the Turner canceled check (with Wyatt account number information redacted) is included as part of Exhibit 5.

14. The Modified Waiver and Release changed the language that was used in each of the prior Waiver and Releases, by now adding the following new language:

- This partial release of liens does not waive any claims for delay, disruption, inefficiency, open change orders, or other claims which Wyatt Incorporated has already written about under separate cover.

(*See* Wyatt's Modified Waiver and Releases, Exhibit 5.)

15. On July 29, 2015, Wyatt executed another Modified Waiver and Release for and in consideration of the joint payment sum of thirty seven thousand eight hundred seventy five dollars seventy two cents ($37,875.72), which Turner paid to Wyatt on July 30, 2015. *See* Wyatt's Modified Waiver and Release (July 29, 2015), **Exhibit 6**; Dickson Decl., Exhibit 1, ¶

13). A copy of the Turner canceled check (with Wyatt account number information redacted) is included as part of Exhibit 6.

16. On September 22, 2015, Wyatt executed another Modified Waiver and Release for and in consideration of the payment of eight thousand nine hundred ten dollars and zero cents ($8,910.00), which Turner paid to Wyatt on September 29, 2015. (*See* Wyatt's Modified Waiver and Release (September 22, 2015), **Exhibit 7**; Dickson Decl., Exhibit 1, ¶ 14.) A copy of the Turner canceled check (with Wyatt account number information redacted) is included as part of Exhibit 7.

17. In summary, (a) between February 9, 2012 and May 5, 2014, Wyatt signed a Partial Waiver on twenty-seven (27) separate occasions (*see* Exhibit 3); (b) between May 27, 2014 and December 1, 2014, Wyatt executed a sworn broad form Waiver and Release against which it was paid (*see* Exhibit 4); and (c) after December 2014, Wyatt modified the broad form Waiver and Release by signing a Modified Waiver and Release, against which it also was paid. (*See* Exhibits 5-7).

E. Wyatt's Counterclaim for damages

18. In its Counterclaim filed on August 10, 2016 (Dkt. 34), Wyatt asserts a single cause of action for breach of the parties' Subcontract. (Counterclaim, p. 10). Wyatt claims damages in excess of $5,312,958.89. (*Id.*, p. 10, at ¶ 44).

III. APPLICABLE LEGAL STANDARDS

A. Summary judgment

Summary judgment, in whole or in part, is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Rule 56(a). Summary judgment will be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). In considering a motion for summary judgment, the Court views the record as a whole and in the light most favorable to the non-moving party. *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 610 (4th Cir. 1985). If, however, the evidence is so one-sided that one party must prevail as a matter of law, summary judgment shall be entered in that party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 2511-12 (1986). For the evidence to present a "genuine" issue of material fact, it must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The non-moving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

B. Contract interpretation

Under West Virginia law, "a valid written agreement using plain and unambiguous language is to be enforced according to its plain intent and should not be construed." *Toppings v. Rainbow Homes, Inc.*, 490 S.E.2d 817, 822 (W.Va. 1997). When a party asserts that a contract term is unconscionable, it bears the burden to prove that the term is both substantively and procedurally unconscionable. *See e.g., Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 227-28 (W. Va. 2012). The West Virginia Supreme Court has described substantive unconscionability as involving "unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party" and noted that "courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." *Id.* at 228. Procedural unconscionability involves inequity or unfairness in the process of bargaining and forming the contract and consideration of, among other things, the sophistication of the parties and whether each party had a reasonable opportunity to understand the contract's terms. *Id.* at 227. Relevant here, Wyatt is an experienced and "nationally recognized . . . construction contractor [that] . . . serve[s] regional and national clients with a broad range of capabilities including interior construction, architectural millwork, exterior panel systems, fireproofing, and access floor services . . . for new construction, renovation, and retrofit projects in both the private and public sectors." (*See* Statement of Undisputed Facts ("SOF"), *supra*, at ¶ 3).[2]

C. Enforceability of releases and waivers

A written release is contractual in nature and, therefore, it is interpreted in the same manner as any other contract term or provision. *See, e.g., Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002) ("This case, like many contract disputes, turns on the interpretation of [the release]...."); and Restatement (Second) of Contracts § 284 cmt. c (1981) ("The rules of interpretation that apply to contracts generally apply also to writings that purport to be releases."). Therefore, courts look to the plain language of the release and "if the

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[2] Moreover, under West Virginia law, "the implied duty of good faith and fair dealing cannot give contracting parties rights which are inconsistent with those set out in the contract." *LaPosta Oldsmobile, Inc. v. General Motors Corporation*, 426 F. Supp. 2d 346, 355 (N.D.W. Va. 2006), *quoting*, *Barn-Chestnut, Inc. v. CFM Development Corp.*, 457 S.E.2d 502, 509 (W. Va. 1995). When there is an express contract relating to the same subject matter as an alleged implied contract, the express contract controls; the two "cannot co-exist." *Case v. Shepard*, 84 S.E.2d 140, 144 (W.Va. 1954).

'provisions are clear and unambiguous, they must be given their plain and ordinary meaning.'" *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996), *quoting, Alaska Lumber & Pulp Co. v. Madigan,* 2 F.3d 389, 392 (Fed. Cir. 1993). *Accord, Doganieri v. United States*, 520 F. Supp. 1093, 1097 (N.D.W.Va. 1981) (enforcing release in accordance with its unambiguous terms).

Federal courts have not hesitated to grant partial summary judgment when a subcontractor has executed broad form releases of claims through a date certain. *See United States f/u/b/o Kogok Corporation v. Travelers Cas. and Sur. Co. of America, et al.*, 55 F. Supp.3d 852, 858-59 (N.D.W.V. 2014) (granting partial summary judgment and ruling as a matter of law that releases and waivers that subcontractor (Kogok) executed were enforceable and, therefore, subcontractor waived all claims that arose on or before 10/31/13); *Morganti National, Inc. v. Petri Mechanical Co., Inc.*, No. Civ. A. 3:98CV309, 2004 WL 1091743, at *5-*6 (D. Conn. May 13, 2004) (granting partial summary judgment for claims that arose before 1/31/97 because the subcontractor executed several releases and waivers of all claims up through that period of time). *See also United States f/u/b/o Chasney and Company, Inc. v. Hartford Accident & Indemnity Co.*, ___ F.Supp.3d ___, 2016 WL 852730, at *6-9 (D. Md. May 4, 2016) (granting partial summary judgment motion and finding that "[b]y signing each release, [the subcontractor] waived all claims relating to work performed through the covered period: no reasonable factfinder could conclude otherwise").

As a matter of law, "[a] party cannot evade the clear language of the release by contending that he did not subjectively intend to release the claim at issue." *Bickings v. Bethlehem Lukens Plate*, 82 F. Supp. 2d 402, 406 (E.D. Pa. 2000) (enforcing release) (citation omitted). *See also United States v. William Cramp & Sons Ship & Engine Building Co.*, 206

U.S. 118, 128 (1907) ("If parties intend to leave some things open and unsettled, their intent so to do should be made manifest."); *Clark Mechanical Contractors, Inc. v. United States*, 5 Cl. Ct. 84, 86 (1984) ("As a general rule, the execution by a contractor of a release which is complete on its face reflects the contractor's unqualified acceptance and agreement with its terms and is binding on both parties.").

In cases involving government contracts, it is "proper" to place the burden on the contractor to specifically identify claims that it is does not intend to release. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1394 (Fed. Cir. 1987). Accordingly, "exceptions to releases of claims are strictly construed against the contractor." *Id.* "It is further well established that where a contractor has the right to reserve claims from the operation of a release, but fails to exercise that right, which is the situation in the case at bar, it is neither improper nor unfair, absent some vitiating or aggravated circumstance, to preclude the contractor from maintaining a suit based on events which occurred prior to the execution of the release." *Clark Mechanical Contractors, Inc. v. United States,* 5 Cl. Ct. at 86 (enforcing release, granting summary judgment, and rejecting contractor's assertion that it had been misled regarding the scope of the release).

Moreover, when an exception is added to a written release that was not included in prior release forms, it is an implicit acknowledgement that the prior release failed to preserve any portion of the claims that were previously released. *See, e.g., Sauer, Inc. v. Honeywell Bldng. Solutions SES Corp.*, 742 F.Supp.2d 709, 719 (E.D. Pa. 2010) (granting partial summary judgment on all claims that arose during the time period covered by prior releases and stating "[b]y expressly altering the content of the release language in connection with its nineteenth and twentieth progress payment applications, Sauer implicitly acknowledged that the unaltered release language had contemplated a waiver of the very claims that it seeks to pursue").

IV. DISCUSSION

A. Based on Wyatt's sworn releases and waivers, summary judgment should be entered against Wyatt with respect to all claims that arose on or before October 31, 2014

As demonstrated above, between May 27, 2014 and December 1, 2014, on seven (7) separate occasions, Wyatt executed a broad form Waiver and Release wherein Wyatt expressly released and waived all lien rights and claims for damages relating to the labor and materials that it provided to the Project for the period up through and including October 31, 2014. (*See* Statement of Undisputed Facts, ¶¶ 10-12). In these sworn Releases and Waivers, Wyatt agreed, for the period ending October 31, 2014, that:

> [Wyatt] does hereby **forever release, waive, and discharge the Released Entities for any and all causes of action, suits, debts, accounts, damages, encumbrances, judgments, claims and demands** whatsoever, in law or equity or otherwise, and whether known or unknown and whether presently ascertainable or not, which [Wyatt] and/or its successors and/or its assignees ever had, now have, or ever will have against the Released Entities, by reason of delivery of material and/or the performance of work relating to the project . . .

(*See* Wyatt's Waiver and Release, subscribed and sworn on December 1, 2014, included as part of Exhibit 4 (emphasis added)).

Courts construe releases by contractors on federal projects in accordance with standard rules of contract interpretation. *See, e.g., BELL BCI Co.*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (holding that clear and unambiguous terms of a release must be given their plain and ordinary meaning). *Cf., Kay-R Elec. v. Stone & Webster Const.*, 23 F.3d 55, 57-58 (2d Cir. 1994) (the court is "not concerned with what was going through the parties heads" when releases were signed; "[r]ather, we are talking about objective principles of contract law."). As the Fourth

Circuit has noted, "[c]ontract interpretation is a subject particularly suited for summary judgment disposal." *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 835 (4th Cir. 1999). *See also United States f/u/b/o Kogok Corporation v. Travelers Cas. and Sur. Co. of America, et al.*, 55 F. Supp.3d at 858 (explaining that a release under a contract is interpreted the same as any other contract term or provision).

Here, Turner respectfully submits that, as a matter of law, the Sworn Releases and Waivers signed by Wyatt (between May and December 2014) are unambiguous and clearly constitute a waiver of all claims by Wyatt to the extent such claims arose on or before October 31, 2014. *See, e.g., United States f/u/b/o Kogok Corporation v. Travelers Cas. and Sur. Co. of America, et al.*, 55 F. Supp.3d at 858-59 (granting partial summary judgment and ruling as a matter of law that releases and waivers that subcontractor executed waived all claims that arose on or before 10/31/13); *Morganti National, Inc.*, 2004 WL 1091743 at *5-*6 (granting partial summary judgment for claims that arose before 1/31/97 because the subcontractor executed several releases and waivers of all claims up through that period of time).

The dispute in *Morganti National, Inc.* arose out of a construction project for the federal government. A subcontractor (Petri) brought a Miller Act claim against the general contractor's surety, as well as a breach of contract action against the general contractor (Morganti). The subcontract agreement stated that the subcontractor could be required to provide releases and waivers as a condition for receiving payment. *See id.* In connection with its submission of applications for payment, the subcontractor executed several releases that released all claims through January 31, 1997. *Id.* at *5. Based on the clear and unambiguous language in the releases, the court entered partial summary judgment against the subcontractor. *Id.* at *6.

Similarly, in *United States f/u/b/o Kogok Corporation*, Judge Frederick Stamp, in a case involving this same construction Project, also ruled as a matter of law that the releases and waivers that a subcontractor executed waived all claims that arose on or before 10/31/13. *United States f/u/b/o Kogok Corporation v. Travelers Cas. and Sur. Co. of America, et al.*, 55 F. Supp.3d at 858-59 (further explaining: "Kogok could dispute the charges rather than waive them. Or, it could have modified the Releases and Waivers for what claims would or would not be waived, as it did later"). *See also United States v. Hartford Accident & Indemnity Co.*, 2016 WL 852730, at *6-9 (ruling that partial releases, executed without exceptions, barred a mechanical subcontractor's claim for delay damages through a date certain).[3]

The same situation is presented here. When Wyatt signed the Wyatt Subcontract, it was on notice that it would be required to execute a release through a date certain with each month's payment requisition. (*See* Subcontract, Exhibit 2, at AP-5, Page 1 of 9 (bold and underline added)). It also was on notice that Turner could require (as part of monthly submissions) that Wyatt provide evidence of the nature and extent of all obligations incurred by Wyatt and the amounts remaining unpaid. (*See* Subcontract, Exhibit 2, Article V, p. 2). Moreover, it is common in the construction industry for a subcontractor to execute a release and waiver as a condition precedent to receiving payment and to put the burden on the subcontractor to expressly identify any claims it is not releasing. (Dickson Decl., Exhibit 1, ¶ 16).

As shown above, on seven separate occasions between May 27, 2014 and December 1, 2014, Wyatt executed a sworn Waiver and Release pursuant to which Wyatt expressly released and waived all claims for damages relating to the labor and materials that it provided to the

[3] In *United States v. Hartford Accident & Indemnity Co., supra*, the court ruled, based on the partial releases that were signed, that the subcontractor was precluded "from recovering any damages (including but not limited to delay damages) arising out of work performed on or before October 31, 2013" (*see id.*, 2016 WL 852730, at *9, n. 23).

Project for the period up through and including October 31, 2014. (*See* Wyatt sworn Waivers and Releases, Exhibit 4; Dickson Decl., Exhibit 1, ¶¶ 9-11). As a matter of law, the fact that the Waiver and Release subsequently was changed by Wyatt with respect to claims arising after October 31, 2014 (*see* Statement of Facts, ¶¶ 13-16) may be taken as an acknowledgment by Wyatt that claims arising before that date were not preserved. *See Sauer, Inc.*, 742 F.Supp.2d at 719. *See also United States f/u/b/o Kogok Corporation v. Travelers Cas. and Sur. Co. of America, et al.*, 55 F. Supp.3d at 858-59 (explaining: "Kogok . . . could have modified the Releases and Waivers for what claims would or would not be waived, as it did later").

V. CONCLUSION

For the foregoing reasons, as well as those stated in the accompanying Declaration and Motion, which are incorporated herein by reference, Turner respectfully moves the Court to enter judgment against Wyatt on all of its claims that arose on or before October 31, 2014. A ruling at this stage of the proceedings will have the salutary effect of reducing the scope of disputed issues during discovery and at the trial of this action.

Dated: September 23, 2016

Respectfully submitted,

/s/ M. David Griffith, Jr.

M. David Griffith Jr. (WVSB # 7720)
Joseph K. Merical (WVSB # 11646)
Thomas Combs & Spann PLLC
300 Summers Street, Suite 1380
Charleston, WV 25301
Phone: (304) 414-1800
Fax: (304) 414-1801
Email: dgriffith@tcspllc.com

Douglas L. Patin (admitted *pro hac vice*)
Michael S. Koplan (admitted *pro hac vice*)
Bradley Arant Boult Cummings LLP
1350 L Street, NW, Suite 1350
Washington, DC 20036
Phone: (202) 393-7150
Fax: (202) 347-1684
Email: dpatin@babc.com
mkoplan@babc.com
Counsel for Turner Construction Company